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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 632

FOSS T. SMITHDEAL, J. BENBOW JONES, EXECUTORS OF JOHN F. SMITHDEAL, DECEASED; FOSS T. SMITHDEAL, J. BENBOW JONES, AND MABEL SMITHDEAL ROBERTSON, TRUSTEES UNDER THE WILL OF JOHN F. SMITHDEAL, DECEASED; WILLIAM FRANKLIN SMITHDEAL AND WIFE, LETHA B. SMITHDEAL; CLINTON BROADNAX SMITHDEAL AND WIFE, RUBY M. SMITHDEAL; MABEL SMITHDEAL ROBERTSON AND HUSBAND, GILBERT H. ROBERTSON; FOSS T. SMITHDEAL AND WIFE, LUCIA J. SMITHDEAL; JOHN FRANKLIN SMITHDEAL, II, AN INFANT; ZACHARY TAYLOR SMITHDEAL, AN INFANT; CLINTON BROADNAX SMITHDEAL, JR., AND WIFE, GRACE H. SMITHDEAL; WILLIAM CARROL SMITHDEAL; SARAH ANN SMITHDEAL, AN INFANT; FOSS T. SMITHDEAL, JR., AN INFANT; DIANNE SMITHDEAL, AN INFANT; JOHN GLENN SMITHDEAL; ESTATES ADMINISTRATION, INC., GUARDIAN OF NANCY BELLE SMITHDEAL, AN INFANT; AND NANCY BELLE SMITHDEAL, AN INFANT; AND JOHN MINOR, GUARDIAN AD LITEM FOR JOHN FRANKLIN SMITHDEAL, II, ZACHARY TAYLOR SMITHDEAL, SARAH ANN SMITHDEAL, FOSS T. SMITHDEAL, JR., AND DIANNE SMITHDEAL, INFANTS, AND PERSONS NOT IN ESSE,

Petitioners,

vs.

ATLANTIC GREYHOUND CORPORATION, A CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROY L. DEAL,
Attorney for Petitioners.

Of Counsel:

F. GAITHER JENKINS,
DEAL, HUTCHINS AND MINOR.

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ATLANTIC GREYHOUND CORPORATION, A CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Prayer

Foss T. Smithdeal, et al., petitioners, pray that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Fourth Circuit entered in the above cause *reversing* the judgment of the United States District Court for the Middle District of North Carolina.

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 192 F. 2d 453 (R. p. 61-69).

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 14, 1951. On December 14, 1951, a petition for a rehearing was filed. Rehearing was denied on December 29, 1951. The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code. Federal jurisdiction was based on diversity of citizenship and the matter in controversy between the parties exceeds the sum or value of $3,000.00, exclusive of interest or costs.

Statement

This is a declaratory judgment action brought by respondent, Atlantic Greyhound Corporation. (For convenience, the parties will hereafter be referred to as Smithdeal and Greyhound).

In 1941 Smithdeal (lessor) and Greyhound (lessee) executed a fifteen-year lease on certain unimproved land in Winston-Salem (R. p. 12-20) containing *inter alia*, a purchase option. The present controversy revolves around this option and the actions of the parties in respect thereto.

In brief, the option language (R. p. 15-19) fell into three parts. The first dealt with the initial five years of the fifteen-year term; the second with the middle five-year period; the last with the final five-year period. The pur-

chase price for each year was stated and increased by $2,000.00 increments from $140,000.00 during the first year to $168,000.00 during the last year of the term.

After covering the first five-year period, the option recited that Smithdeal "at any time prior to July 1, 1946" (expiration of first five years) "for the additional sum of two thousand dollars ($2,000.00) cash to be paid by" Greyhound would grant "a further option" for the middle five years. If the option was exercised during any of the middle five years, this $2,000.00 consideration was to be credited upon the stated purchase price for that year. The last part of the option dealt with the final five years of the lease term and repeated the above-quoted language as to consideration, etc., the only changes being the date of payment of the second additional $2,000.00 (expiration of middle five-year period) and increased purchase prices.

In July, 1946, the central fact of this controversy developed. *Greyhound did not "on or before July 1, 1946" pay the "additional sum of $2,000.00," as required by the option.* This undisputed fact is emphasized because it is the focal point around which the entire controversy revolves.

Thereafter, on two separate occasions Greyhound attempted to buy the property "independent of any option" (Complaint, Pars. XIII and XIV, R. p. 7-8) once in 1946 and again in 1949 at a considerable premium. In 1949, for the first time, Greyhound asserted that it had a right to an independent option for the final five years and made a tender of $2,000.00 for such option. The contention and tender was rejected by John Smithdeal (original lessor—now succeeded in interest by present petitioners). After John Smithdeal's death (December 8, 1949) tender was made to his executors and also refused. Nine months later (September, 1950) this suit for declaratory judgment was instituted by Greyhound.

On June 27, 1951, Johnson J. Hayes, United States District Judge, Middle District of North Carolina, made findings of fact and rendered decision in favor of Smithdeal (R. p. 54-57). Greyhound appealed. On November 14, 1951, the United States Court of Appeals for the Fourth Circuit rendered its decision, reversing the District Court (R. 61-69). Petition of Smithdeal for a rehearing was filed December 14, 1951, and denied December 29, 1951, (R. p. 85).

Questions Presented

1. May the United States Court of Appeals for the Fourth Circuit ignore and fail to apply the following basic rules of contract construction?

   1. Contracts should be strictly construed against the party drawing the contract.
   2. The practical construction of the parties should be given great, if not controlling, weight.
   3. Contracts between businessmen should be construed in accordance with a business sense.
   4. Contracts should be strictly construed in favor of the party bound and against the party not bound.

2. Is a contract to be construed upon a supposition that one party has the greater investment?

Reasons For Granting Certiorari

I

General Reasons

(1) The United States Court of Appeals for the Fourth Circuit has rendered a decision in this case which is in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

(2) The United States Court of Appeals for the Fourth Circuit has decided important questions of local law clearly in conflict with local decisions.

(3) The United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II

Specific Reasons

(Note: All quoted material below is taken from the opinion of the Fourth Circuit in this cause. R. p. 61-69.)

A. *Conflict of Decisions*

(1) The record reveals (Reply, Par. V) that Greyhound prepared the lease and used its own language with respect to the option. In addition, it is apparent that nothing Smithdeal did, *or could have done,* could create the situation now before this Honorable Court. Only Greyhound could create this controversy by failing, as it did, to pay the stipulated consideration at the stipulated time. Other United States Courts of Appeal and the North Carolina cases have applied the rule that where language used in a contract gives rise to ambiguity, that ambiguity is resolved *against* the party choosing the words. Here the Fourth Circuit has resolved the ambiguity *in favor* of the party choosing the words.

(2) Contrary to decisions of other United States Courts of Appeal, and to North Carolina cases, the Court gave no weight to practical construction, despite the general rule that the practical construction of the parties, *ante litem motam,* is given great, if not controlling, weight. Thus, the Court recognizes, as a fact, that Greyhound, *after* the critical date in 1946 had passed, twice tried to purchase

the property independent of *any* option and at premium prices (R. p. 65). Certainly this could only mean that Greyhound itself considered that its failure to pay according to the terms of the option had caused the option to expire. Nevertheless, the Court failed to consider this practical construction placed *by Greyhound on its own failure to act.* It ignored also the fact, as shown by the record, that Greyhound, with knowledge of the position in which it had placed itself in 1946 by its failure to comply with the option provisions, waited for over four years to bring a declaratory judgment action, although during that period Smithdeal openly and consistently held to a position contrary to that finally adopted by Greyhound. The action was instituted only after death had sealed the lips of the original lessor. Certainly Greyhound's silence during this four-year period could only be interpreted as an admission and acceptance of Smithdeal's position.

(3) Other United States Courts of Appeal and the North Carolina cases have held that the general understanding of businessmen, as to the ordinary rights and liabilities of a contract, is considered in determining their intent. Here, the Fourth Circuit recognized that the parties contracted with these ordinary meanings in mind: "There is a natural tendency to think of the rights of the parties in terms of the ordinary renewable lease or option contract with which we are familiar and to construe the language used as though the parties were trying to express the terms of this sort of a contract." (R. p. 65). But, although the Court thus recognized the established legal and business framework in which the parties contracted, they then proceeded to ignore this well-nigh determinant factor: "We think then there is little, if any, ambiguity in the contract *if preconceived no-*

tions about extension of option contracts are ignored, and only the language used by the parties is considered and given its ordinary meaning." (Emphasis supplied) (R. p. 67).

(4) Other United States Courts of Appeal, and numerous North Carolina cases, have held, in repeated decisions, that an option contract is to be construed strictly in favor of the party bound (optionor) and against the party not bound. Here the Fourth Circuit held that, in respect to "the strict and technical rules of interpretation ordinarily applied to option contracts;" "Those rules, however, have no application here." (R. p. 68—).

B. *Departure From Course of Judicial Proceedings*

(1) After recognizing the "strict and technical rules of interpretation ordinarily applied to option contracts" and then stating that, "Those rules, however, have no application here," (R. p. 68) the United States Court of Appeals for the Fourth Circuit, as a basis for failing to apply the ordinary rules of interpretation, states: "What we have is, not an ordinary option contract, but an option contained in a lease under which *the lessee has more money invested in the property than the lessor.*" (R. p. 68) (Emphasis supplied). It is strongly emphasized that no finding of fact, nor any part of the record, bears out the assumed fact as to relative investment, contained in this statement. It is vehemently asserted that such fact, if assumed, is irrelevant. It is respectfully urged that the learned Court below, through an unwarranted assumption of an irrelevant fact, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel:
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BRIEF

The following brief is respectfully submitted in support of the reasons advanced as a basis for granting the petition of certiorari.

Preliminary Statement

It is urged that this petition does not fall within that classification of cases wherein petition for certiorari is denied because the Court is called upon "to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1924). While certainly the peculiar facts involved must be considered in arriving at a decision, they are only incidental to this Honorable Court's consideration. At stake here are certain fundamental rules of contract construction. The complex legal relationships of persons in all walks of life throughout the country with respect to certain of their property rights have been built upon these rules of construction. It is respectfully urged that this Honorable Court reaffirm the integrity of such rules.

Nor does this case fall within the interdiction of "another hearing on matters peculiar to a single controversy." *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922 (1923). As one example, taking this case out of the above rule, the Fourth Circuit clearly holds that options appendant to leases are construed differently than options in gross *if the party not bound has the greater investment.* If so, this is a unique and *new* rule of great importance. An increasingly large number of long-term leases contain options to purchase, and thus provide wide potentiality for application of this new rule. Favorable federal tax legislation permits amortization of leasehold improvements, such as here involved, over the relatively short lease period. Under this legislation the Government, through loss of tax revenues, bears a large part of the cost of such improve-

ments. Therefore, such leases are widely used, and this unique new rule would find wide application. The new rule is thus of great importance and deserves the attention and affirmation, or condemnation, of this Honorable Court.

The essential facts herein involved are established. They need no review or discussion. Review, however, is needed of the decision below insofar as it abrogates or ignores the following basic precepts of contract construction:

1. Contracts are strictly construed against the party drawing the contract.
2. Practical construction of a contract by the parties is entitled to great, if not controlling, weight.
3. Contracts between businessmen are construed in accord with a business sense.
4. Contracts are to be construed strictly in favor of the party bound and against the party not bound.

These rules are peculiarly applicable in almost every controversy involving option contract construction. It is respectfully urged that the effect of the decision of the learned Court of Appeals below, if allowed to stand, will be to obscure these rules of long standing, and to form a basis for ignoring such rules in future similar cases.

In addition, on the basis that the learned Court below, through an unwarranted assumption of irrelevant fact, has greatly departed from the usual and accepted course of judicial proceeding, your petitioners are, it is respectfully urged, entitled to the protection inherent in the exercise of this Court's power of supervision.

I

Rules of Construction

1. *Generally:* It is apparent that the option contract here involved is latently ambiguous. The parties themselves disagreed as to its interpretation when Greyhound's con-

struction was finally advanced; the District Court Judge labeled the construction sought by Greyhound (and that adopted by the Fourth Circuit) as "absurd"; the opinion of the Fourth Circuit, although inconsistent on the point of ambiguity, treats it as being ambiguous. Thus, while the opinion speaks of there being "little, if any, ambiguity in the contract" (R. p. 67) and holds that "the parties intended exactly what they said", the entire opinion interprets the contract as though ambiguous; applies rules only applicable where ambiguity exists, (viz, the reference to, and comparison of, a prior letter of negotiation with the final terms of the contract (R. p. 66); cites (erroneously) the rule that in leases uncertainty is resolved against the landlord) (R. p. 68).

Thus, petitioners say that the option contract is latently ambiguous. It is most important that it be noted that it is a *latent* ambiguity. If Greyhound had paid the option money for the middle five-year period, there could be no real controversy. It is crystal clear that Greyhound, and Greyhound alone, through its failure to pay the stipulated sum at the stipulated time, created this controversy. *Nothing that Smithdeal did, or could have done,* could have transformed this latent ambiguity into the present real controversy.

In view of this clearly established ambiguity, there seems no basis for the learned Court's failure to solve that ambiguity by applying established basic rules of construction. But, *per contra,* the opinion specifically states that two of these rules (unilateral contracts construed against party not bound; general understanding of parties before contract governs) are inapplicable, while citing no basis for failure to apply.

2. *Construction against party drawing.*

Rule: "Since one who speaks or writes can by exactness of expression more easily prevent mistakes in meaning,

than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter." *Williston on Contracts,* Rev. Ed. (1936) Sec. 621, P. 1788.

Decisions:

United States. "A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage." *Calderon* v. *Atlas S. S. Co.,* 170 U. S. 272, 280, 42 L. Ed. 1033, 18 S. Ct. 588 (1898); *Southern Railway Co.* v. *Coca-Cola Bottling Co.,* 145 F. 2d 304, 307 (C. A. 4th N. C.) (1944): "When the words of a contract are ambiguous, it is a well known and worthy maxim of our law that such ambiguities should be resolved against the party that drew the contract and selected its terminology and nomenclature. Omnia praesumuntur contra proferentem." *Busch* v. *Midland Finance Co.,* 64 F. 2d 859, 861 (C. A. 8th Mo.) (1933) cert. den. 290 U. S. 645, 78 L. Ed. 560, 54 S. Ct. 64; *Peerless Corp.* v. *International Corp.,* 126 F. 2d 239, 241 (C. A. 3d Del.) (1942); *Flotation Systems* v. *U. S. for use of Pollia,* 136 F. 2d 483, 484 (C. A. 9th Cal.) (1943).

North Carolina. "It is also a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing." *Jones* v. *Palace Realty Co.,* 226 N. C. 303, 37 S. E. 2d 906, 907 (1946); *Gould Morris Electric Co.* v. *Atlantic Fire Ins. Co.,* 229 N. C. 518, 50 S. E. 2d 295, 297 (1948); *Hardy* v. *Ward,* 150 N. C. 385, 64 S. E. 171 (1909).

Application: It is conceded that Greyhound's attorney drew the lease and option to purchase (Reply, R. p. 40). Thus, applying the established rule cited above, any ambiguity in the wording thereof should be most strictly con-

strued against Greyhound. But the Fourth Circuit construed the contract most stringently against Smithdeal, who admittedly had nothing to do with its preparation. Thus in a most appropriate case, the Fourth Circuit refused to apply a basic rule which it had labeled as a "well known and worthy maxim" in the *Southern Railway Co.* case, *supra.* This, despite the fact that Greyhound created the ambiguity by its choice of words and compounded such ambiguity by failing to perform according to terms of its own choosing.

3. *Practical Construction.*

Rule: "The interpretation placed upon the contract by the parties themselves is to be considered by the court *and is entitled to great, if not controlling, influence* in ascertaining their understanding of its terms. In fact, the courts will generally follow such practical interpretation of a doubtful contract." (Emphasis supplied) 12 Am. Jur. 249, P. 787.

Decisions:

United States. Old Colony Trust Co. v. *Omaha,* 230 U. S. 100, 118, 57 L. Ed. 1410, 33 S. Ct. 967 (1913); *Thomson* v. *Thomson,* 156 F. 2d 581, 586 (C. A. 8th Mo.) (1946); *Barnett* v. *West Const. Co.* 69 F. 2d 266, 268 (C. A. 5th Fla.) (1934); *National Bank* v. *Fidelity & Casualty Co.,* 125 F. 2d 920, 923, 140 A.L.R. 694 (C. A. 4th N. C.) (1942).

North Carolina. "The ante litem motam practical interpretation of the parties is a safe guide in the interpretation of contracts." *Jones* v. *Palace Realty Co.,* 226 N. C. 303, 37 S. E. 2d 906, 907 (1946); *Cole* v. *Industrial Fibre Co.,* 200 N. C. 484, 157 S. E. 857 (1931); *Hood* v. *Davidson,* 207 N. C. 329, 177 S. E. 5 (1934).

Application: The record reveals conduct of the parties which can only lead to the conclusion that both Greyhound

and Smithdeal, *ante litem motam*, construed the option contract as having expired upon Greyhound's failure to pay $2,000.00 on or before July 1, 1946. These instances of conduct are discussed below:

1. In "September or October", 1946 Greyhound "independently of any option" and being "mindful of the fact" that it had no option, tried to buy the property for $150,000.00 (Complaint XIII, R. p. 7). Smithdeal states that the conversation in which this offer was made also covered the effects of non-payment and "that it was mutually agreed that the option to purchase was terminated." (Letter August 9, 1949, R. p. 36). Nor was this the first time Smithdeal's position was stated in writing. In April, 1949, apparently right after Greyhound had, for the second time, sought to buy the property independently of any option (Complaint XIV, R. p. 7) (See 2, below), Smithdeal, referring to the option as having expired, said: "You will recall that we discussed the matter some time ago, *and I thought we both came to that conclusion at that time.*" (Emphasis supplied) (Letter April 30, 1949, R. p. 37). Greyhound (through Leinbach) states that the conversation at the time of the first offer referred "only to the possibility" that Smithdeal might wish to sell (Letter September 28, 1949). It stretches credulity to, and beyond, the breaking point, to believe that Greyhound's statement is accurate. It must be noted that Greyhound (Leinbach) approached Smithdeal in September or October, 1946 and offered to purchase outside of "any option." It is almost incredible to say that at the time of this offer no mention was made of the option money due just two months past. It must also be noted that Greyhound took over seven (7) weeks to reply to Smithdeal's *second* letter which once again clearly stated a contrary position to that finally adopted by Greyhound, although both Smithdeal and Greyhound (Leinbach) both resided in Winston-Salem. *Greyhound has never replied to Smithdeal's letter of April 30, 1949, also stating that both parties*

had concluded that the option had expired. In the ordinary course of events, *if Greyhound then construed the option as it does now,* either of Smithdeal's letters would have evoked an immediate and violent response. Greyhound's silence under the circumstances can only be interpreted as an implied admission that this failure to pay the $2,000.00 due on or before July 1, 1946 had, as twice asserted by Smithdeal in writing, caused all option rights to expire.

2. In April, 1949 Greyhound again attempted to purchase, admittedly outside of any option, and for a large premium (Complaint XIV, R. p. 7). Greyhound's 1949 offer to purchase *outside of any option* for $160,000.00 must be viewed in the light of Greyhound's present position to get its full significance. Greyhound now contends that there were three separate, independent options, any one of which Greyhound, in its discretion, might take or refuse. If that was the intent of both parties, then there is no logical explanation of Greyhound's conduct in making the $160,000.00 offer. If Greyhound's position is correct, it knew, at the time of the premium offer, that it could have purchased an option for the final five years and then purchased the property at $160,000.00 as late as July 1, 1952—three and one-fourth years after its offer (Cf. latter portion Clause 8, Lease, R. p. 17). Thus, Greyhound, by its offer, tendered to Smithdeal a premium of three and one-fourth years' interest on $160,000.00 (At 6% simple interest, the premium was $31,200.00) We think it a matter for judicial notice that Greyhound is not a philanthropic institution. Businessmen do not pay $31,200.00 for a right which they know they already possess. It is respectfully submitted that Greyhound's action in offering this premium speaks louder than their later words claiming a separate, independent option right. Their action can only be construed as an admission in April, 1949 that they, together with Smithdeal, considered any option rights to have expired because of their failure to pay the price agreed upon to keep the option alive.

3. Smithdeal's position was clear from 1946 on—he asserted in letters addressed to Greyhound that the option had expired and Greyhound had no further option rights to the property. In the face of this position, Greyhound did nothing for more than three years, *except to twice try to buy the propery for a premium price and independent of any option.* (See 1 and 2, above) Then for the first time, as revealed by the record (letter August 4, 1949, R. p. 24), Greyhound asserted a right to a separate option for the final five years of the term. (This assertion is treated of in 4, below.) Smithdeal's response was immediate, definite and unequivocal. (Letter August 9, 1949, R. p. 36.) He rejected Greyhound's construction, stated his position clearly and pointed out that Greyhound had previously adopted the same construction, i.e., all option to purchase rights had expired. After the issue was thus clearly drawn, Greyhound again lapsed into silence (except for the tardy Leinbach letter), which can justly be construed as acquiescence. This silence lasted for over a year. During this period John Smithdeal (original lessor) died (December 8, 1949, R. p. 52). Only on August 17, 1950, did Greyhound, for the second time, assert its construction once more (nine months after John Smithdeal's death; twelve and one-half months after first asserting such position). Again it was in the form of a tender of purchase money for what Greyhound now asserted was a separate, independent option for the final five-year period of the lease. John Smithdeal's executors refused and reasserted Smithdeal's position. Suit was finally brought on September 1, 1950, well after death had sealed the lips of John Smithdeal (original lessor).

Thus, there were over four years during which Greyhound not only knew that Smithdeal consistently and openly held that any option to purchase under the lease had expired, but during which Greyhound *acted* (failing to deny Smithdeal's written notice of his position and twice trying to buy "independently of any option") as though it also construed its rights to have

expired. Silence, under these circumstances, must certainly be held to speak louder than words. Greyhound's conduct over this four-year period can only be construed as an admission that it, in accord with Smithdeal, agreed that all right to a purchase option had terminated when Greyhound failed to pay in accord with terms of its own drafting.

4. Greyhound now insists that, in 1941, it was the intention of both parties that three separate, independent options were set up by the option contract. They assert loudly that the language Greyhound chose clearly and unambiguously sets out these independent options. But once again they speak in contradiction of their acts. The attention of this Honorable Court is directed to the last sentence of the second last paragraph in each of the tender notices (R. p. 24-27).

> "For convenience, however, we request that you prepare, execute and deliver to us a separate agreement of option which incorporates all of the revelant terms and conditions presently contained in said Lease and Option to Purchase agreement."

It is apparent from such language that Greyhound had so little confidence in their own language, creating, according to them, separate, independent options, that, *even if Smithdeal had accepted the tender,* Greyhound wanted the "separate, independent" options restated in "a separate agreement." Why?

Summary: The record thus shows:

1. That Smithdeal, from and after the failure of Greyhound to pay the stipulated $2,000.00 for an option for the middle five-year term, openly and consistently maintained that all of Greyhound's option rights had expired.

2. Greyhound's conduct in five separate instances:

(a) Offer in 1946 to buy "independent" of any option.

(b) Offer in 1949 to buy at what amounted to a $31,200.00 premium.

(c) Silence for over three years in the face of Smithdeal's position.

(d) Failure to bring suit until nine months after the issue had been sharply drawn and then only after death had sealed the lips of one of the original parties.

(e) Demand for a "separate agreement" to embody what Greyhound then contended was a "separate, independent" option.

It is respectfully submitted that these established significant circumstances clearly demonstrate a practical construction, by both Greyhound and Smithdeal, to the effect that any purchase option under the lease had expired. Although these instances of practical construction are based on admitted facts; were fully briefed; were argued and presented to the United States Court of Appeals for the Fourth Circuit, that Court, in spite of the established rule according such practical construction "great, if not controlling, weight", ignored this rule of construction, as it also ignored other applicable rules.

4. *Construction of business contracts.*

Rule: "That interpretation should be adopted which, under all the circumstances of the case, ascribes the most reasonable, probable and natural conduct to the parties. Business contracts must be construed with business sense as they naturally would be understood by intelligent men of affairs and in the same sense as is uniformly attached to them in the business world." 12 Am. Jur. Sec. 231, P. 755.

Decisions:

United States. "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *North German Lloyd* v. *Guaranty Trust Co.*, 244 U. S. 12, 24, 61 L. Ed. 960, 37 S. Ct. 490 (1917); *DuPont and Co.* v. *Claiborne Reno Co.*, (C. A.

8th Iowa) (1933) 64 F. 2d 224, 228; *Erie R. Co.* v. *Ohio Public Service Co.*, (C. A. 6th Ohio) (1932) 62 F. 2d 83.

North Carolina. "All instruments should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results. . . ." *Fairbanks, Morse & Co.* v. *Twin City Supply Co.*, 86 S. E. 1051, 1054, 170 N. C. 315 (1915); *Atlantic & N. C. R. Co.* v. *Atlantic & N. C. Co.*, 61 S. E. 185, 147 N. C. 368 (1908); *Commercial National Bank* v. *Charlotte Supply Co.*, 38 S. E. 2d 503, 514, 226 N. C. 416 (1946).

Application: The Fourth Circuit, by its opinion, found that the parties, in 1941, intended to create three separate, independent options among which Greyhound, in its sole discretion, might pick and choose. Such a construction is neither reasonable nor sensible. The learned District Court in its opinion labeled such construction as reaching an "absurd result" (Opinion, D. C., R. p. 57). If we put ourselves in the shoes of the parties in 1941 before the option contract was executed, it is apparent that the value to Greyhound, and the detriment to Smithdeal, of tying this valuable piece of property (apparent market value of $140,000.00) to a purchase option for fifteen years was worth a valuable consideration. No reasonable businessman would give, *or expect to get,* a unilateral right to tie up such property for fifteen years for nothing. But, under the opinion of the Fourth Circuit, that result follows because the $2,000.00 payable for the third five years must be deducted from the purchase price and nothing was due for the second five years, during which period the property was effectively bound also. As Judge Hayes stated in his opinion (R. p. 57): "It is inconceivable that an experienced real estate dealer . . ." (Smithdeal) would assent to such a proposition. We submit that it is equally inconceivable that Greyhound *expected to get* such a valuable right for nothing.

The learned Court of Appeals below pointed to leases

giving an option to purchase at the expiration of the lease term as illustrating the reasonableness of their construction. Such provisions are, as stated by the court, not unusual. But, a cursory examination of such leases shows that the option so given is usually that of first refusal. It is most unusual, if not unique, to find any businessman willing to bind himself to sell real property at definite prices for fifteen years without some consideration. The Fourth Circuit (Opinion, R. p. 67) points to the price increase for the third period as the reason Smithdeal would be willing to tie up his property. The short answer to this assumption is that it is more reasonable to find that Smithdeal expected to get, and Greyhound expected to give, not only the price increase, but also the stipulated sum of $2,000.00 for the middle five-year period. The price increase was because of the increase in value; the $2,000.00 was for the option privilege. Any sound investment increases in value over a normal fifteen-year period. If Smithdeal had put his money in any sound investment, his rate of increase would have been far more than $2,000.00 per year, (an approximate increase of only 1.2% per year on an average value of $150,000.00).

In effect, the Fourth Circuit ignores the language dealing with the second five-year period. But that language was not mere surplusage. It must be accepted as speaking the intent of the parties. The Fourth Circuit, in support of its construction, refers to Smithdeal's letter of November 25, 1940 (Opinion, R. p. 66). Since the learned Court felt there was "little, if any, ambiguity" in the option language, it is difficult to see why this letter was considered at all, it being usually held that proof of prior negotiations is precluded by the execution of a written contract. However, consider this letter and particularly the phrase therein on which the Fourth Circuit placed such stress: "If no purchase has been made up to this time (the end of the second five-year

period), I will sell you an option to purchase during the third five-year term." The learned Court of Appeals entirely overlooked the point of this phrase. The very words "if no purchase has been made up to this time" clearly implies a right to buy during the second five-year period. If they had no option during the middle five years, these words are inoperative. It is clear that the parties meant just what is ordinarily meant by businessmen in giving a real estate option. Paraphrasing the option here involved, the seller says: "I'll give you an option for thirty days, then for an additional $50.00 I'll give you a further option for thirty more days and credit the $50.00 on the sales price if you buy during that time. At the end of sixty days if you haven't purchased as yet, I'll give you a further option for thirty days for $50.00 additional and credit that $50.00 on the purchase price if you buy during the last thirty days." No one would expect a seller to bind property for ninety days under such a contract and not receive some recompense. He must have intended to get the middle $50.00 and the purchaser must have intended to pay it if the property was to be bound for ninety days. Otherwise, they might just as well have said: "I'll give you an option for ninety days for nothing." We submit that Smithdeal intended to get, *and Greyhound intended to give,* the middle $2,000.00, if the property was to be bound up to an option for fifteen years. The parties were dealing with a fifteen-year lease and obviously intended to provide for an option covering the same period.

Certainly, the words, used in the option clause of the lease, "further option" and "additional" $2,000.00 must mean something. Webster's Dictionary defines "further" to mean: "in addition, additional;" and "additional" to mean: "added, being in the nature of an addition." Black's Law Dictionary defines "additional" as follows: "This term embraces the idea of joining or uniting one thing to

another so as thereby to form one aggregate." It is submitted that the ordinary, general business interpretation to be placed on these terms where used in the option clause language dealing with the third five-year term is:

1. The "further option" is one to be added to what has gone before, namely the option given for the first five years and *purchased* for the second five years, to form an aggregate option for fifteen years.
2. The "additional" $2,000.00 joins with the rent, and the $2,000.00 paid for the middle five years to make the aggregate consideration payable for the fifteen-year option.

If Greyhound intended to get, or Smithdeal to give, entirely separate options, it would have been easy and natural for Greyhound, the drafter, to use the term "independent option" instead of "further option." The insertion of a single word would have precluded the present controversy. But, it is submitted that had either "independent" or "separate" been inserted, *Smithdeal would have refused to sign!*

The Fourth Circuit construes these words as though they were hanging in space and unrelated to what has gone before. Any competent businessman or attorney, if asked prior to 1946 whether it was necessary for Greyhound to pay the middle $2,000.00 to keep this option alive, would have advised that it was not only necessary, but mandatory.

5. *Option Contracts.*

Rule: ". . . and when contracts are optional in respect to one party, they are strictly interpreted in favor of the party bound and against the party that is not bound." *Williston on Contracts,* Rev. Ed. (1936) Sec. 620, P. 1788.

Decisions:

United States. Pyrate Corp. v. *Sorensen,* (C. A. 9th Cal.) (1930) 44 F. 2d 323; *Price* v. *Stonega Coal Co.,* (D. C. S. D.

W. Va.) (1938) 26 F. Supp. 173, 178; *Giddens* v. *Estero Bay Estates*, 18 F. 2d 265 (C. A. 5th Fla.) (1927).

North Carolina. "Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy . . ." *Winders* v. *Kenan*, 161 N. C. 628, 77 S. E. 687 (1913); *Bateman* v. *Lumber Co.*, 154 N. C. 248, 70 S. E. 474 (1911); *Carpenter* v. *Carpenter*, 213 N. C. 36, 195 S. E. 5 (1938).

Application: This rule is often spoken of as being akin to estoppel. It is equitable in nature. Certainly it is just to construe ambiguities in favor of the party bound and against the party not bound. Greyhound had every opportunity to keep this option alive. They failed to do so. Whether designedly or otherwise, this failure to live up to the terms of the option clause caused Greyhound, even under a liberal construction of their own choice of words, to lose any and all option rights. *A fortiori,* this result follows if the option clause is construed strictly in accord with the dictate of this rule. But the Fourth Circuit, after admitting that "strict and technical rules of interpretation *ordinarily*" apply to option contracts, then held that these rules "have no application here." No reason is cited. It is submitted that the rules *are* applicable (as admitted) and that the failure to apply them is error deserving of review.

The Fourth Circuit states: "The option provisions were inserted in the lease for the manifest purpose of enabling plaintiff (Greyhound) to protect itself . . ." Admit this to be true. To insure that protection, all Greyhound need have done was to pay the $2,000.00 for the middle five-year period. It failed to avail itself of the protection it had carefully inserted in its own words. May Greyhound now insist that the courts ignore (as the Fourth Circuit did) not only

this failure to protect itself, but to extend a protective cloak woven out of the broken fabric of established rules of construction?

6. *Summary.*

The contract was ambiguous. Apt, well established rules of construction based on admitted facts should have been resorted to in order to solve this ambiguity. The Fourth Circuit ignored these clear rules. It did not:

(a) Construe ambiguities against the party drawing the contract;

(b) Give any, much less *controlling,* weight to practical construction by the parties;

(c) Construe the option contract in accord with normal business practice;

(d) Construe a unilateral contract in favor of the party bound and against the party not bound.

The Fourth Circuit, after ignoring such well established rules, cited no known rule in support of its construction. In effect, the learned Court lifted itself by its own bootstraps and based its opinion on a new and most unusual rule which apparently measures intent by amount invested!

II

Departure from Judicial Course

It is apparent from the opinion of the learned Court of Appeals below that their decision is based upon an unwarranted assumption of irrelevant fact.

Repeatedly they speak of the relative investment of the parties and tacitly assume that Greyhound had more money at stake than did Smithdeal. Thus, the opinion states:

> "What we have is, not an ordinary option contract, but an option contained in a lease *under which the lessee has more money invested than the lessor.*" (Emphasis supplied) (R. p. 68)

> And (speaking of intent) ". . . the lessee, *who had more invested in the property than the lessor,* . . ." (Emphasis supplied) (R. p. 67)

It is submitted that a cursory examination of the Fourth Circuit's opinion will reveal that this alleged disparity in investment is the fact upon which decision turned. But such assumed fact is irrelevant. A simple test using the same contract is sufficient. If Smithdeal, instead of Greyhound, had the greater investment, should that change the contract? If both parties had an equal investment, should that change the contract? Obviously, the answer is "no." The parties must be held to their intention as expressed. If the clear, established rules of construction determine that intent, then any disparity in investment is irrelevant. Counsel for petitioners know of no rule of law that states that a contract will be construed strictly in favor of the party having the greater investment. Here, paraphrased, the Fourth Circuit says: "This is an option contract. It must by law be strictly construed in favor of the party bound. However, here the party bound has the lesser investment. Therefore, the rule of law must be ignored, and the option construed strictly against the party bound and in favor of the party with the greater investment." The absurdity of such reasoning is self-apparent.

Nor does equity favor such a rule. The mere fact that one party has "more money invested" than the other is not the criterion of relative investment. A might invest his life savings in a contract with B, a wealthy corporation. On a dollar and cents basis, B's investment might outweigh that of A's by ten to one. Yet to B that might be a very small investment, while to A it represents his whole life's savings. Who has the greater investment? Who is more deserving of protection? These illustrations are cited to show the irrelevancy of bottoming construction on such an unstable

basis. It changes the search for intent into an auditing procedure. If the parties intended that Greyhound get three separate, independent options, that intent must govern. If they intended that Greyhound get one option, subject to be twice extended; or three separate options, with the last two dependent on the existence of the prior options, that intent must govern. In either event, consideration of the dollar investment would not change that intent. Therefore, as a criterion of intent, or for any purpose, the fact of relative investment is irrelevant. It is submitted that the learned Court of Appeals below stepped far aside from the usual and accepted course of judicial proceedings in permitting themselves to consider and to base their opinion on such irrelevant fact.

Unwarranted Assumption: The Fourth Circuit found that Greyhound had more money invested than Smithdeal. On that fact they based their opinion. But their finding of fact is erroneous.

No evidence was admitted to show relative investment. The record is silent as to where, or at what prices, Smithdeal acquired the property involved. The record does show that he acquired the property at different times. It may well have been that Smithdeal acquired this property at prices which made his dollar investment greater than that of Greyhound. If the decision is to turn on the fact of relative investment, then evidence of such facts must be admissible. But it is clear that such evidence, if offered in the District Court below, would have been excluded as irrelevant and immaterial. Apparently, the learned Court of Appeals fell into error through consideration of the construction cost ($213,000.00) as representing Greyhound's investment and the first year's sales price as stated in the option ($140,000.00) as Smithdeal's investment. But it is clear that Smithdeal's prospective sales price would

be based on estimated market value and not on investment. He could very well have paid much more for the property than the price at which he was willing to sell. It is not at all unusual for an individual to sell an investment at less than he paid for it. This Honorable Court may take judicial, and perhaps personal, notice of such fact.

If it is said that this expressed market value represented Smithdeal's investment, the Court is no further enlightened. The relative market values are not shown by the record. Although Greyhound is found to have spent $213,000.00 in building this bus terminal, that fact does not establish market value. The building was designed as a bus terminal, with runways, bus stalls, waiting rooms and a concourse—all peculiarly suited for use as a bus station. To Greyhound it was worth $213,000.00. To anyone else it might be worth $100,000.00, or more, less because of the alterations necessary to convert it to ordinary business use. In fact, it might prove a liability. So the construction cost could not be considered the market value. But the Fourth Circuit considered the market value on one side as compared to the construction cost on the other side as being equivalents from which they determined relative investment. It is submitted that the absurdity of such reasoning is apparent.

Thus, the record is devoid of any evidence as to relative investment. No evidence admitted, nor proffered, established any fact showing which party had the greater investment. There was no finding of fact by the District Court on the point. Notwithstanding the complete absence of any evidence on the subject, the learned Court of Appeals found such a fact *and based its opinion thereon.*

However, let us assume, arguendo, that the fact of relative investment *is* relevant, and that the record shows that Greyhound invested more money than Smithdeal. Would

such facts change the construction and intent of the parties? Your petitioners most earnestly contend that it would not.

After citing this irrelevant and unwarranted fact, the learned Court of Appeals below then failed to take clearly established facts into account. The parties entered into this contract in 1941. Therefore, to determine their intent the Court should have placed itself in the position of the parties in 1941. If they had done so and viewed the future course of this lease and option from that viewpoint, the facts as to relative investment establish a far different picture than that relied upon by the Court.

Thus, the stated sales prices show that Smithdeal's investment, *as agreed upon by both parties,* would increase from $140,000.00 to $168,000.00 over the lease period. At the critical date, namely July 1, 1951, Smithdeal's investment was thus stated as being $160,000.00. The record is silent as to any change in Greyhound's investment, *just as it is silent as to what Smithdeal's original investment was.* However, facts falling within the scope of judicial notice establish Greyhound's investment at each of the critical dates. Judicial notice may be given to the economics of depreciation and to federal tax legislation.

(a) *Depreciation:* Certainly general experience would dictate depreciation of this bus terminal over a maximum period of forty years. Thus, over the first ten years of the lease the bus terminal would depreciate one-fourth in value or to a net balance of $159,750.00, representing Greyhound's investment at the end of ten years of the term, at which time Smithdeal's investment, *by agreement,* would have been $160,000.00. It might well be argued that, in a commercial sense, because of the peculiar nature of the improvements (bus terminal), the rate of depreciation would be higher, and thus the net investment of Greyhound lower at the end of ten years, or July 1, 1951, the critical date.

(b) *Tax Legislation:* Under applicable tax legislation and regulations (I. R. C. Secs. 23 (1) (n); 114; Regulations Sec. 29-23 (1) -1 Depreciation; Par. 14,032 (1) P-H Federal Tax Guide, 1952) the rate of depreciation was much higher. Greyhound could have, and undoubtedly has, depreciated the entire cost of the leasehold improvements over the fifteen-year lease period, since the lease provided that the improvements would be the property of the lessor upon termination. Thus, at the end of ten years, two-thirds of the cost of construction was depreciated. Therefore, as of the critical date, we find the following investment picture:

	Smithdeal	Greyhound
July 1, 1951	$160,000.00	$71,000.00

Under these laws and regulations the Government, through lessened tax revenues, bears a heavy share of the cost of leasehold improvements.

These facts as to rates of depreciation, tax legislation, and estimated future increases in land values were available and known to both parties in 1941. Therefore, it is only reasonable to assume that they contracted with these figures in mind. In 1941 then, Smithdeal and Greyhound, looking forward to 1951, must be found to have realized that Smithdeal's interest in the property would, in the normal course of events, far exceed Greyhound's.

With these facts in mind it must be remembered that the *crux* of this entire controversy *is the intent of both parties in 1941 as to what the situation would be as of July 1, 1951, if (as happened) Greyhound failed to pay the $2,000.00 stipulated to be paid on or before July 1, 1946 to keep the option alive.* If we apply the criterion of the learned Court of Appeals (intent is determined by relative investment), then it must be held that the parties intended that Smithdeal would not be bound, under the circumstances of this case, by any option in 1951, because at that time his investment was

the greater! Petitioners urge that the learned Court of Appeals fell into error in applying their own unique rule that the greater investment determines intent. They applied the rule in 1951 looking back to 1941. They should have applied it from the viewpoint of 1941 (when intention was formed and expressed) looking forward to 1951.

But the real and fatal fault is not the application of this new rule. Rather it is the bare fact that such a rule has been announced and applied. If permitted to stand unchallenged by this Honorable Court, this rule practically insures the contracting party able to make the greater investment of immunity from judicial application of well established rules of construction. It tells the poor man that contracts are read in the light of "dollar intent" and not of expressed intent. Truly, this unique new rule constitutes a contractual pitfall. Your petitioners strongly feel that this Honorable Court will not permit it to be dug.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 632

FOSS T. SMITHDEAL, J. BENBOW JONES, EXECUTORS OF JOHN F. SMITHDEAL, DECEASED; FOSS T. SMITHDEAL, J. BENBOW JONES, AND MABEL SMITHDEAL ROBERTSON, TRUSTEES UNDER THE WILL OF JOHN F. SMITHDEAL, DECEASED; WILLIAM FRANKLIN SMITHDEAL AND WIFE, LETHA B. SMITHDEAL; CLINTON BROADNAX SMITHDEAL AND WIFE, RUBY M. SMITHDEAL; MABEL SMITHDEAL ROBERTSON AND HUSBAND, GILBERT H. ROBERTSON; FOSS T. SMITHDEAL AND WIFE, LUCIA J. SMITHDEAL; JOHN FRANKLIN SMITHDEAL II, AN INFANT; ZACHARY TAYLOR SMITHDEAL, AN INFANT; CLINTON BROADNAX SMITHDEAL, JR., AND WIFE, GRACE H. SMITHDEAL; WILLIAM CARROL SMITHDEAL; SARAH ANN SMITHDEAL, AN INFANT; FOSS T. SMITHDEAL, JR., AN INFANT; DIANNE SMITHDEAL, AN INFANT; JOHN GLENN SMITHDEAL; ESTATES ADMINISTRATION, INC., GUARDIAN OF NANCY BELL SMITHDEAL, AN INFANT; AND NANCY BELLE SMITHDEAL, AN INFANT; AND JOHN MINOR, GUARDIAN AD LITEM FOR JOHN FRANKLIN SMITHDEAL II, ZACHARY TAYLOR SMITHDEAL, SARAH ANN SMITHDEAL, FOSS T. SMITHDEAL, JR., AND DIANNE SMITHDEAL, INFANTS, AND PERSONS NOT IN ESSE,

Petitioners,

vs.

ATLANTIC GREYHOUND CORPORATION, A CORPORATION,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Nature of Case

This case involves a lease between private parties. The Smithdeals (who were defendants below and who are petitioners here) leased a vacant lot in Winston-Salem, North

Carolina, to Greyhound (who was plaintiff below and who is respondent here) for a term of fifteen years. This lease gave Greyhound the right to build a bus station on the vacant lot at its own expense and contained an option permitting Greyhound to purchase anytime during the first five years of the lease at stated prices which increased $2,000 each year (Transcript, pp. 12-20).

The lease also provided that upon the payment by Greyhound of $2,000 on or before July 1, 1946, the Smithdeals would give an option to purchase during the next five-year period at certain stated prices applicable to each year of this second five-year period. These prices increased $2,000 each year. Greyhound did not exercise its right to acquire an option for this second five-year period.

The lease likewise contained a provision that upon the payment by Greyhound of $2,000 on or before July 1, 1951, the Smithdeals would give an option to purchase during the third five-year period at stated prices applicable to each year of this third five-year period. These prices increased $2,000 each year.

Greyhound built a bus station on the property at a cost of $213,000 (Transcript, pp. 5 and 28) and prior to July 1, 1951 tendered $2,000 to acquire an option for the third five-year period. This tender was refused and the Smithdeals denied that Greyhound had the right to acquire an option for the third five-year period upon the ground that the right to obtain an option for the third five-year period was dependent upon its having obtained an option for the second five-year period. Greyhound instituted this suit for a declaratory judgment under the provisions of 28 U. S. C., Section 2201. The Court of Appeals for the Fourth Circuit, by unanimous opinion, held that Greyhound had the right to acquire an option for the third five-year period. 192 F. 2d 453. (Transcript, pages 61-69.)

It will be seen, therefore, that this is merely a private controversy fraught with no significance to anybody but the parties to this suit and involving nothing but the construction of a written instrument and the consideration of uncontradicted testimony surrounding its execution and the attempt by Greyhound to exercise its rights thereunder.

Scope of This Brief

This brief is only in opposition to the petition for a writ of certiorari and will be confined to the reasons why, in the judgment of counsel for the respondent, the writ should not issue from this Court. No effort will be made to debate the merits of the controversy as this is the function of a later brief if certiorari should be granted. Moreover, it is felt that the opinion of the Court of Appeals does ample justice to the merits of the controversy.

ARGUMENT

This Court Does Not Issue the Writ of Certiorari Except for Special and Important Reasons

Rule 38(5) of the Revised Rules of the Supreme Court of the United States provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

This rule has been affirmatively stated in the opinions of this Court many times and in wide variety of cases:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; *and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by*

this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics supplied.)

Magnum Import Company v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, at 924, 43 S. Ct. 531.

In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, at 714, 43 S. Ct. 422, Mr. Chief Justice Taft said:

". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

The rule has been negatively stated even more pungently:

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273, at 1275, 58 S. Ct. 849.

"We do not grant a certiorari to review evidence and discuss specific facts."

United States v. *James J. Johnson*, 268 U. S. 220, 69 L. Ed. 925, at 926, 45 S. Ct. 496.

We find no case where this Court has granted certiorari to a Court of Appeals to review the construction of a lease, an option, a combination of the two or any other form of private agreement in the absence of a clear cut conflict between circuits.

This Case Does Not Present Special and Important Reasons Justifying the Issuance of the Writ of Certiorari

Summary of Argument

The petitioners' argument and the respondent's answer thereto contained in this brief may be summarized under two heads:

(1) That the Court of Appeals did not correctly construe the written instrument. Certain well understood rules of construction in aid of ambiguous instruments are cited which the petitioners contend were not applied.

The short answer to this contention is that the instrument is not ambiguous. The Court of Appeals said: "We think that there is little, if any, ambiguity in the contract if preconceived notions about extension of option contracts are ignored and only the language used by the parties is considered and given its ordinary meaning" (Transcript, pp. 67-68).

(2) That the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervision. The basis for this contention is a mere reference by the Court of Appeals to the fact that, unlike most leases, the lessee here has more invested in the property than the lessor.

The short answer to this contention is that the Court did not base its opinion upon this fact but merely disposed of the landlord's contention that certain strict and technical rules of construction should be applied by pointing out that "What we have here is, not an ordinary option contract, but an option contained in a lease under which the lessee has more money invested in the property than the lessor. The options have been included in the lease, not merely to enable the lessee to acquire the lessor's property but primarily to prevent the lessee's own expenditure in improving

the property being lost upon the expiration of the lease" (Transcript, p. 68).

Concerning the Alleged "Reasons for Granting Certiorari"

The petitioners have asserted as "the reasons for granting certiorari" (petition, pp. 4-5): (1) A conflict with other United States Courts of Appeals; (2) A conflict with local decisions; and (3) Departure from accepted and usual course of judicial procedure.

As to the first two reasons; that is conflict with other United States Courts of Appeals and conflict with local decisions, it is sufficient to say that the petitioners have neglected to cite the supposed conflicting decisions. *No case remotely similar to the present case is cited in the petitioners' entire brief.*

It is obvious that the petitioners in claiming conflict mean only that well understood principles of law recognized in other circuits and in North Carolina and applied in their decisions in proper cases were not applied in this case. For example, on pages 11 to 13 of the petitioners' brief, it is asserted that the rule of construction that ambiguities are to be considered against the draftsman shall not apply. Decisions of this Court and of other circuits and c[illegible] Supreme Court of North Carolina are cited. None of these cases deal with similar facts and apparently it is not claimed that they do. The citation of such wealth of authority for so simple a proposition was hardly necessary, particularly when some of these cases were from the Fourth Circuit. The petitioners miss the point: This rule comes into play only when there is ambiguity in a written instrument and when the real intention of the parties cannot be drawn from the language of the instrument. This argument was made before the Court of Appeals in the present case which disposed of it as well as other secondary rules of construction

claimed to be applicable by concluding (Transcript, pp. 67-68):

> "We think that there is little, if any, ambiguity in the contract if preconceived notions about extension of option contracts are ignored and only the language used by the parties is considered and given its ordinary meaning."

It is submitted that this is no conflict at all. The United States Court of Appeals for the Fourth Circuit has described this rule as a "well known and worthy maxim of law", *Southern Railway Co.* v. *Coca Cola Bottling Co.*, 145 F. 2d 304, 307, and applied the rule in that case and in many others. The fact that the Fourth Circuit in the present case found the rule *inapplicable,* does not place it in conflict with other circuits or with the North Carolina Courts which in proper cases have found the rule *applicable.* The same thing may be said of all the arguments advanced in the petitioners' brief under the heading "Rules of Construction", beginning at page 10. Most of these are secondary rules of construction and are to be resorted to only when the meaning of an instrument is not clear. These rules were evolved over the years to determine the intent of the parties when the meaning of an instrument is obscure, not to defeat that intention when the meaning is clear.

As to the third reason assigned by the petitioner for granting certiorari; namely, a departure by the Court of Appeals from accepted and usual course of procedure, it will be seen that this argument rests upon a strained and distorted interpretation of the opinion of the Court of Appeals.

Most of the Rules of Construction Cited by the Petitioners Are Inapplicable

1. *Construction Against Party Drawing Instrument*

That this rule is not applicable to instruments which are not ambiguous has been discussed in the immediately preceding section of this brief and will not be repeated.

It should be added here, however, that the necessary factual foundation for applying the rule even to an ambiguous instrument is lacking. It is only a half truth to assert that the instrument involved in this case was drawn by the respondent. The District Judge said in his opinion (Transcript, p. 54):

> "The contract was written by an able lawyer employed by the tenant but later the landlord paid half of the fee to the tenant."

When this is considered in connection with the fact that the lease was based upon a letter dated November 25, 1940, written by Mr. Smithdeal himself (See Transcript, pp. 49-50, and opinion of Court of Appeals, Transcript, p. 62), it becomes apparent that the instrument was drafted no more by the respondent than by the petitioners.

2. *Practical Construction of the Parties*

No one would deny that the practical construction which the parties themselves give the contract is of value in construing the contract. An essential condition to the application of this rule, however, is that the interpretation must be the interpretation of *all* the parties and not merely the interpretation of one. *National Bank* v. *Fidelity and Casualty Co.*, 125 F. 2d 920, 142 A.L.R. 694 (C.A. 4th). An examination of the record will show that there is not the slightest basis for a contention that the respondent ever

concurred in the petitioners' construction of this lease. The petitioners' argument on this point deals with the merits of this case rather than with any reason why certiorari should be granted. Fortunately, their lengthy argument is summarized on pages 17 and 18 of their brief where five specific instances of respondent's conduct are cited as showing an alleged acquiescence in the petitioners' position. We deal with these specific instances briefly:

(a) That Greyhound Offered to Buy in 1946 Independently of Any Option

This is completely irrelevant. Greyhound recognized that it had no right to buy in 1946 which was during the second five-year period (July 1, 1946, to July 1, 1951) as its option for the first five years had expired and as it never claimed to have obtained an option for the second five-year period. See Article XIII of the complaint (Transcript, p. 7) and Article 13 of the answer (Transcript, p. 30). The attitude of all parties concerned toward this offer is well stated in a letter from the Treasurer of Greyhound to its Vice-President, written November 21, 1946, just after the offer had been declined by Mr. Smithdeal (Transcript, p. 45):

> "I intended telling you when in New York on Monday that I had several conversations with Mr. John F. Smithdeal in regard to his attitude towards Atlantic Greyhound purchasing the ground upon which the Bus Station here in Winston-Salem stands. *He finally told me last week that he would prefer to run along on a lease basis, so in view of the fact that we did not make a payment to him last June under the terms of the lease I imagine we are going to have to wait until he changes his mind, or until the next date comes around when we can make a payment and then exercise our rights under the lease, should we so desire.*" (Italics supplied.)

It is clear from this letter *written at the time* that Greyhound recognized it had no right to buy during the second five-year period and that Smithdeal did not question the right of Greyhound to obtain an option for the last five-year period.

(b) That Greyhound Offered to Buy in 1949 at an Alleged Premium

This again is irrelevant. This was still in the second five-year period (July 1, 1946, to July 1, 1951) during which Greyhound did not claim to have any right to purchase. This offer was made independently of any option and is chiefly significant as inspiring some self-serving letters from Mr. Smithdeal written three years after the event and obviously in anticipation of a lawsuit in which he claimed for the first time that he thought it was understood between him and Mr. Leinbach in 1946 "that the option to purchase had terminated" (Transcript, p. 36). Of course, the first five-year option had terminated, but if Mr. Smithdeal meant any more than that, it was certainly not so understood by Mr. Leinbach. See quotation from Mr. Leinbach's letter of November 21, 1946, set out under (a) above. The entire letter will be found in the Transcript at page 45.

As to the alleged premium, we can only say that counsel are to be complimented upon their ingenuity. The price Greyhound offered was $160,000. This is the exact price Greyhound would have had to pay in the first year of the third five-year option period (July 1, 1951, to the end of the lease); that is to say, the price it would have had to pay at the earliest date it could have acquired a right to buy. The alleged premium of $31,200 was arrived at by computing 6% interest from the time the offer was made in 1949 until July 1, 1951, and disregarding all rent which Greyhound

would have been relieved of paying if it had purchased the property.

(c) That Greyhound Remained Silent for Three Years in the Face of Smithdeal's Position

As we have pointed out under (b) above, Smithdeal took no position in 1946 except that the first five-year option had expired and no option had been purchased for the second five-year period, neither of which were in dispute. He merely said, "that he would prefer to run along on a lease basis" (Transcript, p. 45). This gave Greyhound no cause for alarm. Why should it have taken any action in 1946 when it had until July 1, 1951, to acquire an option for the last five years?

(d) That Greyhound Waited 9 Months After the Issue Was Drawn in 1949 and Until After Mr. Smithdeal Died Before Commencing Suit

As soon as Mr. Smithdeal wrote his self-serving letters in 1949, which was the first time he denied Greyhound's right to acquire an option for the last five-year period, Greyhound tendered $2,000 on August 4, 1949 (Transcript, pp. 24-25), and denied in writing the belated assertion by Mr. Smithdeal that Greyhound had lost its right to obtain an option (Transcript, pp. 46-47). Mr. Smithdeal died suddenly before suit was instituted, but it is obvious that preparations were under way to bring suit during Mr. Smithdeal's lifetime as is evident from the tender made to him personally on August 4, 1949 (Transcript, pp. 24-25); see also admission in answer, Article 15 (Transcript, pp. 30-31). After he died an identical tender was made to his Executors and testamentary Trustees (Transcript, pp. 26-27); see also admission in answer, Article 17 (Transcript, pp. 21-32).

(e) That Greyhound Demanded a Separate Option Agreement

In the first place Greyhound did not demand any separate option agreement. The "Notice and Receipt" accompanying the tender, first made to Mr. Smithdeal personally (Transcript, pp. 24-25) and later to his Executors and testamentary Trustees (Transcript, pp. 26-27), contained this request:

> "It is our understanding that the tender or acceptance of the sum of Two Thousand Dollars ($2,000) aforesaid creates a complete and irrevocable option whereunder we have the right to purchase the aforesaid real estate during the period July 1, 1951, to April 15, 1956, upon the terms and conditions set forth in said Lease and Option to Purchase agreement. For convenience, however, we request that you prepare, execute and deliver to us a separate agreement of option, which incorporates all of the relevant terms and conditions presently contained in said Lease and Option to Purchase agreement."

The petitioners are merely making a play on words when they identify the respondent's contention that the instrument in question provides for "separate and independent" options with its request made when attempting to acquire one of those options that it be recorded in a "separate" agreement. The convenience of an option contained in a separate agreement is manifest. An abstracter of title would not have to go beyond such an instrument to know that there was an option outstanding. Without it, the abstracter while put on notice that Greyhound had the legal right (upon payment of $2,000 before July 1, 1951) to obtain such an option, would have to make inquiries outside the land records to ascertain whether Greyhound had exercised this right.

3. *Construction of Business Contracts With Business Sense*

The best statement of this rule is by this Court in *North German Lloyd* v. *Guaranty Trust Company*, 244 U. S. 12, 61 L. Ed. 960, 966, 37 S. Ct. 490:

> "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."

The petitioners cannot properly complain that this rule was not applied. Actually it was applied, but with results unfavorable to them. Indications of the use of "business sense" by the Court of Appeals permeates the entire opinion. Witness the fundamental observation by the Court that "The option provisions were inserted in the lease for the manifest purpose of enabling plaintiff to protect itself with respect to this expenditure and are to be interpreted in the light of this purpose;" its analysis of the ascending option prices for each year of the lease (Transcript, p. 67); its comparison of the landlord's return under the lease with the interest rate provided to be paid to the landlord in the event of a sale upon deferred payments (Transcript, p. 67); and its final conclusion that the rule of construction by which it should be guided is that stated by the Supreme Court of North Carolina as follows (Transcript, p. 69):

> "If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results."

4. *Rules of Construction Peculiar to Option Contracts*

The petitioners contend that the true rule is that when contracts are optional with respect to one party, they are strictly interpreted in favor of the party bound and against

the party that is not bound. The petitioner cites some decisions from other circuits and some decisions of the Supreme Court of North Carolina. The decisions cited, however, deal only with the general subject of options. In North Carolina at least, it is clear that options given to a tenant in connection with the right to renew a lease are construed in case of ambiguity in favor of the tenant and not in favor of the landlord. In *First Citizens Bank and Trust Co.* v. *Frazelle,* 226 N. C. 724, 727, 740 S. E. 2d 367, the Court said:

> "The defendants contend the lease is ambiguous in its provisions relating to the renewals. It is the law, however, that in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored and not the landlord."

It is undisputed that the law of North Carolina controls this case. Even if there had been an ambiguity (and the Court of Appeals held that there was little, if any), then such ambiguity should be resolved in favor of the tenant, particularly when the option provisions were inserted to protect its investment of $213,000 in the cost of a building erected on a vacant lot and where a contrary interpretation would result in what amounts to a forfeiture of the tenant's investment.

Since no case is cited by the petitioners from other circuits involving similar facts, there can be no conflict between the decision of the Fourth Circuit and other circuits. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting certiorari since the conflict may be merely a corollary to a permissible difference of opinion in the state courts. *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860.

True, the Court of Appeals has not applied certain secondary rules of construction for the very good reason that

they are not applicable, but the Court of Appeals has applied the paramount and controlling rules of construction; namely, to determine the true intention of the parties as shown by the instrument; and to interpret a business contract with "business sense" so as to arrive at an interpretation which conforms with the presumed meaning because it does not produce unusual and unjust results and does not work a forfeiture.

The Court of Appeals Did Not Depart from Accepted and Usual Judicial Course

It is a grave charge that a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the supervision of the Supreme Court of the United States.

Certainly the Supreme Court in appraising this charge, will look to the opinion of the Court of Appeals to see for itself what the Court of Appeals actually did. That is all that is necessary to dispose of this charge.

The petitioners make the statement in their brief that the Court of Appeals based its opinion upon the fact that Greyhound had more money invested in the property than Smithdeal. See petitioners' brief, page 26. The Court of Appeals remarked upon the relative investment of the parties merely by way of pointing out that this is not a typical option agreement but a case where the optionee (tenant) has more money invested in the property than the optionor (landlord). It is said merely by way of disposing of certain strict and technical rules of construction urged upon the Court which might be applicable to ordinary option agreements, but to say that the Court of Appeals based its opinion upon the relative investments of a landlord and a tenant is wholly unwarranted.

Conclusion

It is respectfully submitted that the petition for writ of certiorari should be denied as being merely an effort to obtain another hearing on a case of no importance to anyone but the parties to it.

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